

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
August 27, 2007 Session

**AEROSTRUCTURES CORPORATION and ZURICH AMERICAN
INSURANCE COMPANY v. DAVID RADER**

**Direct Appeal from the Chancery Court for Davidson County
No. 03-2263-III Ellen Hobbs Lyle, Chancellor**

**No. M2006-01361-WC-R3-WC - Mailed - December 18, 2007
Filed - January 18, 2008**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for a hearing and a report of findings of fact and conclusions of law. The employee, David Rader, sustained a permanent hearing loss, which he alleged was caused by his work. The only doctor to testify completed a C-32 which stated that the hearing loss was more probably than not related to Mr. Rader's work, but had no specific knowledge of noise levels at Mr. Rader's workplace other than Mr. Rader's subjective statements. The trial court ruled that Mr. Rader failed to sustain his burden of proof, and entered judgment for the employer, Aerostructures Corporation. Mr. Rader has appealed. We reverse the judgment of the trial court, and award 15% permanent partial disability to his binaural hearing.

Tenn. Code Ann. § 50-6-225(e) (Supp. 2006) Appeal as of Right; Judgment of the Chancery Court Reversed

DONALD P. HARRIS, SR. J., delivered the opinion of the court, in which CORNELIA A. CLARK, J. and ALLEN W. WALLACE, SR. J., joined.

Mary Leech, Nashville, Tennessee for the appellant, David Rader.

Aaron S. Guin and Stephen W. Elliott, Nashville, Tennessee for the appellees, Aerostructures Corporation and Zurich American Insurance Company.

MEMORANDUM OPINION

I. FACTUAL AND PROCEDURAL BACKGROUND

David Rader injured his shoulder in the course of his job at Aerostructures Corporation (Aerostructures), an aircraft parts manufacturer. Aerostructures filed this action in Davidson County Chancery Court concerning that injury. Mr. Rader filed a counter-claim which alleged that he had sustained a gradual hearing loss as a result of his employment. Only the hearing loss claim is before the Panel.

Mr. Rader was 51 years old at the time of trial. He was a high school graduate. He had worked briefly as a machinist for Aerostructures on two occasions in the early 1970s. He also worked as a frame carpenter and as a machinist for other employers. In 1981, he returned to work for Aerostructures. With the exception of some periods during which he was laid off, he continued to work for Aerostructures up to the time of trial. He held several different jobs there, including bench machinist, portable and perishable tool mechanic, paint shop worker and computer numerical control (“CNC”) machine operator. As a machinist, he operated lathes, mills, grinders and drill presses. In the paint shop, he operated a sprayer, referred to as a “cup gun.” His job as portable and perishable tool mechanic involved repairing, and sometimes making parts for, machinery in the plant. The CNC machine manufactured large parts using a computer program. Mr. Rader was a CNC operator at the time of trial. He had been in that job since 2000. He was a lead man, supervising four other employees.

Mr. Rader testified that he worked in a large open area in which aircraft parts are assembled. He estimated the size of the building to be four hundred yards long and forty to fifty yards wide. As few as twenty or as many as one hundred fifty other employees worked in the same area at any given time. Some of those employees assembled metal aircraft parts with riveting tools. According to Mr. Rader, riveting created a very large amount of noise. Mr. Rader testified that the CNC machine made an air noise like a “hissing sound” but did not create the same level of noise as the riveting. He also testified that he did not have a history of hearing problems or ear infections in his youth. He had hunted and used a chain saw on occasion.

Mr. Rader testified that Aerostructures provided earplugs to its employees at various times during his employment, but at other times did not. He said that, beginning in approximately 2000, Aerostructures began to provide earplugs on a regular basis. Regulations of the federal Occupational Safety and Health Administration (“OSHA”) were placed into evidence. These regulations provide, inter alia, that an employer is required to provide hearing protection when workplace noise levels reach eighty-five decibels in an eight hour shift.

Aerostructures regularly administered hearing tests to its employees. In 2002, Aerostructures informed Mr. Rader that one of these tests showed a “standard threshold shift” in his baseline hearing. He was offered a panel of physicians for further examination. He chose Dr. Gregory Mowery.

Dr. Mowery's testimony was presented via a C-32 Standard Form Medical Report for Industrial Injuries and also a deposition. He examined Mr. Rader on one occasion, January 23, 2003. In the C-32, he opined that Mr. Rader had sustained a binaural high frequency sloping sensorineural hearing loss. He assigned permanent impairment to the hearing of 9.4% to the right ear and 11.2% to the left ear, which translated to a total binaural hearing loss of 9.7%. On the C-32, he also stated that Mr. Rader's hearing loss more probably than not arose from his employment. Dr. Mowery wrote a letter to Aerostructures on January 24, 2003 which stated "This does appear to be mainly a noise-induced hearing loss that has occurred over many years."

Aerostructures introduced a cross-examination deposition of Dr. Mowery taken pursuant to Tennessee Code Annotated section 50-6-235(c)(1) (2005). Dr. Mowery did not have any information concerning results of noise level testing at Aerostructures's premises. He agreed that this would be useful to determine if Mr. Rader had been exposed to noise levels with the potential to cause hearing loss. He had not been in the plant. His knowledge of the level of noise at Aerostructures was based upon what Mr. Rader had told him. He agreed that such information was subjective. In response to questioning by counsel for Mr. Rader, Dr. Mowery testified that he had seen forty to fifty other workers from Aerostructures who had been referred for evaluation of their hearing loss.

Mr. Rader was fifty-one years old at the time of trial. He was a high school graduate, with no additional education or training. In addition to his work for Aerostructures, he had experience as a carpenter and house painter. He had also worked as a machinist for other employers. Mr. Rader testified that he sometimes had difficulty hearing music on the radio or the sound of coins falling from his pocket. He occasionally used a device called a Hunter's Ear, which is apparently an over-the-counter hearing aid. He stated that his hearing loss did not cause him any problem at work. This testimony was corroborated by his supervisor, Stan Rothermich.

The trial court issued a memorandum decision, holding that Mr. Rader had not sustained his burden of proof to establish that his hearing loss was caused by his employment. In its memorandum the trial court stated:

From the foregoing the Court concludes that the employee established a *prima facie* case of causation with the C-32 testimony of Dr. Mowery. That *prima facie* case, however, was outweighed by Dr. Mowery's deposition testimony that the employee's identification of his hearing loss as caused by noise at Aerostructures was highly subjective in conjunction with the proof that noise levels at Aerostructures are not outside of acceptable OSHA levels. With that proof by the employer, the burden shifted back to the employee to demonstrate with expert medical proof that the employee's susceptibility to a hearing loss was caused by the levels at the Aerostructure facility. That proof was not provided, and, thus, the employee's burden on causation was not carried.

After a motion to alter or amend the trial court's judgment was filed in behalf of Mr. Rader, the trial court concluded that its finding that the noise levels at Aerostructures were not outside acceptable OSHA levels was not supported by the record but concluded that amendment did not change the outcome of the case. From this judgment, Mr. Rader has appealed.

II. STANDARD OF REVIEW

The standard of review of issues of fact is *de novo* upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2005). When credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). Where the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions, and the reviewing court may draw its own conclusions with regard to those issues. Bohanan v. City of Knoxville, 136 S.W.3d 621, 624 (Tenn. 2004); Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997). A trial court's conclusions of law are reviewed *de novo* upon the record with no presumption of correctness. Ganzevoort v. Russell, 949 S.W.2d 293, 296 (Tenn. 1997). Where the only dispute between the parties is the conclusion to be reached from the undisputed facts and evidence, the question on appeal is one of law and our review of the trial court's conclusions is *de novo* with no presumption of correctness. Id.

III. ANALYSIS

In order to be eligible for workers' compensation benefits, an employee must suffer an "injury by accident arising out of and in the course of employment which causes either disablement or death" Tenn. Code Ann. § 50-6-102(12) (2005). The term "arising out of" employment refers to causation. Reeser v. Yellow Freight Sys., Inc., 938 S.W.2d 690, 692 (Tenn. 1997). An injury arises out of employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Clark v. Nashville Mach. Elevator Co., 129 S.W.3d 42, 47 (Tenn. 2004); Fink v. Caudle, 856 S.W.2d 952, 958 (Tenn. 1993). The injury must result from a danger or hazard peculiar to the work or be caused by a risk inherent in the nature of the work. Thornton v. RCA Serv. Co., 188 Tenn. 644, 221 S.W.2d 954, 955 (Tenn. 1949).

Although causation in a workers' compensation case cannot be based upon speculative or conjectural proof, absolute certainty is not required because medical proof can rarely be certain, and any reasonable doubt in this regard is to be construed in favor of the employee. Clark, 129 S.W.3d at 47; Hill v. Eagle Bend Mfg. Inc., 942 S.W.2d 483, 487 (Tenn. 1997). Our courts have thus consistently held that an award of benefits may properly be based upon medical testimony to the effect that the employment could or might have been the cause of the worker's injury when, from other evidence, it can reasonably be inferred that the employment was the cause of the injury. Id.

Evidence that the employment could have or might have caused the injury is sufficient to make out a *prima facie* case that the injury arose out of the employment. Clark, 129 S.W.3d at 49. If the employer introduces no evidence to the contrary, the preponderance of evidence supports an award of workers' compensation benefits. Id.

Dr. Mowery's diagnosis, as stated in his January 24, 2003 letter to Aerostructures, was "noise induced hearing loss." He further opined in his C-32 that Mr. Rader's hearing loss had been caused by his exposure to noise in the workplace. However, he had no hard data, such as reports of noise level testing, upon which to base his opinion. He had never been on Aerostructures's premises, so he possessed no personal knowledge concerning the noise level in the plant. His opinion was based entirely upon information provided by Mr. Rader, which he conceded on cross-examination was "very subjective."

As described in the January 2003 letter, the information which Mr. Rader provided to Dr. Mowery was that "he has worked at Aerostructures for approximately twenty-two years and states that he has worn hearing protection a large portion of that time but not nearly as much in his first few years of work. He denies other ear history or noise exposure." The "Patient History" portion of the C-32 states: "Patient exposed to noise at work for approximately 22 years. Initially hearing protection not required. Has worn hearing protection for many years." In our view, Dr. Mowery's testimony and his C-32 should, at the minimum, be construed as stating that Mr. Rader's hearing loss "could have been" caused by exposure to noise in the workplace.

We therefore turn to the lay testimony of Mr. Rader and his wife, to determine if it provides a sufficient basis to infer a causal relationship in light of the medical proof. Mr. Rader testified that the CNC machine which he operated made a hissing sound, but the primary source of noise in the plant was from rivet guns operated by aircraft assemblers. He described these as having a "repetitious jackhammer effect." He stated that the noise of the rivet guns "will override any other noise by far." Mr. Rader worked in the same building as the assemblers.

He testified that as few as twenty or as many as one hundred fifty persons worked in the building at one time, and that it was "pretty loud . . . when everybody is there" He had been wearing ear protection since some time before 2000, but there were periods when ear plugs were not provided to employees. During those periods, employees would "plug their ears with their fingers" when riveting took place. Mr. Rader's wife added that when he called her from work "I can hear the background noise, and sometimes it's louder than usual . . . and we can't even talk it's so loud over the phone."

As stated above, Dr. Mowery's diagnosis was "noise-induced hearing loss." Aerostructures does not assert that the diagnosis was incorrect, but only that there was insufficient evidence to conclude that the cause of the condition was noise exposure in the workplace. This assertion is based upon the fact that Dr. Mowery did not have the results of noise level testing inside the Aerostructures plant and his opinion was based upon Mr. Rader's subjective description of those noise levels. The trial court agreed with Aerostructures and found that even though Mr. Rader had

established a *prima facie* case as to causation, it was overcome by Dr. Mowery's testimony that his opinion was based upon Mr. Rader's subjective description of the noise levels he had experienced. We disagree, and reverse.

Tennessee Code Annotated section 24-7-115 (2000) provides as follows:

In the trial of any civil suit, there shall be received in evidence if offered on behalf of any party thereto, opinions as to medical findings as a result of treatment or examination of the party, whether such opinions are based on subjective or objective findings; provided such opinions are those of persons otherwise qualified as medical experts. It is declared to be the intent of this section that medical opinions based on subjective findings are no longer to be excluded from evidence whether the opinion is from the treating expert or an expert called in for purposes of examination and evaluation.

Under the above statute, the opinion of a qualified medical expert witness based on subjective findings alone is sufficient to establish medical causation and the permanency of disability, if the evidence is found to be credible by the trial judge. Johnson v. Schevenell Ready Mix, Inc., 608 S.W.2d 582, 584 (Tenn. 1980); Cates v. Better Bilt Aluminum Co., 607 S.W.2d 476, 478 (Tenn. 1980). There is nothing in the record or the memorandum of the court that would suggest Mr. Rader's description of the noise levels in the plant is not credible. His testimony concerning this issue was not contradicted and the trial court expressly found his testimony credible with regard to other issues. In our view, the lay evidence introduced at trial in support of Mr. Rader's claim was sufficient to support the conclusion that he was exposed to a high level of noise over a period of many years in the course of his employment. Mr. Rader's hearing loss was caused by exposure to noise; he worked in proximity to metal parts being riveted together; he denied that he had any long-term noise exposure outside of the workplace; and no evidence of any other exposure was introduced.

Resolving, as we must, all reasonable doubts regarding causation in favor of Mr. Rader, we conclude that the medical proof, although based upon subjective findings, establishes a *prima facie* case that Mr. Rader's hearing loss was caused by exposure to loud noise at his workplace over a period of years. Aerostructures offered no evidence to the contrary. According to the holding in Clark, supra, we must conclude the preponderance of the evidence supports an award of workers' compensation benefits and, thus, preponderates against the judgment of the trial court on the issue of causation.

The trial court did not make an alternative finding concerning the extent of Employee's permanent disability. See generally, Durant v. Saturn Corp., No. M2003-00566-SC-WCM-CV, 2004 WL 941012, at *8 (Tenn. Workers' Comp. Panel, Apr. 30, 2004) (stating that even if the trial court renders a judgment of no compensation, it should still make an alternate finding on all determinative issues). However, it did state in its findings that the effect of this hearing loss on Mr. Rader's ability to work or find work was minimal. We concur in this finding but note that an employee is not

required to establish vocational disability or loss of earning capacity to be entitled to benefits for the loss of use of a scheduled member. Lang v. Nissan N. Am., Inc., 170 S.W.3d 564, 569 (Tenn. 2005). Based upon the trial court's finding and a careful review of the record, we find that Mr. Rader has sustained a 15% permanent partial disability for binaural hearing loss.

CONCLUSION

The judgment of the trial court regarding the compensability of Mr. Rader's hearing loss is reversed. Mr. Rader is awarded a 15% permanent partial disability for binaural hearing loss. The case is remanded to the trial court for entry of an appropriate judgment and any further proceedings consistent with this opinion. Costs of the appeal are taxed to Aerostructures and Zurich American Insurance Company, for which execution may issue if necessary.

DONALD P. HARRIS, SENIOR JUDGE

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JUDGMENT

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference.

Whereupon, it appears to the Court that the Memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs will be paid by Aerostructures and Zurich American Insurance Company, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM